TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 242.

SAMUEL LUMIERE, APPELLANT,

vs.

MAE EDNA WILDER, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JANUARY 4, 1921.

(28,634)

(28,634)

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 16, 1922.

1 *Equity Subpœna.*

The President of the United States of America to May Edna Wilder, Inc., Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Samuel Lumiere and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you of two hundred and fifty dollars ($250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 9th day of Sept. in the year one thousand nine hundred and twenty-one and of the Independence of the United States of America the one hundred and forty-sixth.

ALEX. GILCHRIST, JR.,
Clerk.

ALMY, VAN GORDON & EVANS,
Plaintiff's Sol'rs.

The defendant is required to file its answer or other defense in the above cause in the Clerk's office of this Court, on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[Seal of U. S. D. C., So. D. N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

Filed Sep. 16, 1921. U. S. District Court, S. D. of N. Y.

2 (Attached to Subpœna.)

I hereby certify, That on the 9th day of September 1921, at the City of New York, in my district, I served the within Subpœna in Equity upon the within named Defendant May Edna Wilder, Inc., by exhibiting to Thomas Adkins as Pres. of said Inc. at Biltmore Hotel, New York City, N. Y., the within original, and at the same time leaving with him a copy thereof. And at the same time and place left with him a copy of Bill of Complaint in this suit.

(Signed) THOMAS D. McCARTHY,
United States Marshal, Southern District of New York.

Dated, September 12th, 1921.
J. M. K.

3 United States District Court for the Southern District of New York.

E 22—149.

SAMUEL LUMIERE, Complainant,

against

MAY EDNA WILDER (INC.), Defendant.

Bill in Eqwity.

To the Honorable Judges of the United States District Court for the Southern District of New York:

Complainant, Samuel Lumiere, is an individual engaged in the profession of photography at #574 Fifth Avenue, State, County and City of New York, a citizen of the said State and City of New York and the United States, brings this, his bill of complaint against the defendant, Mae Edna Wilder, a corporation organized and doing business under and by virtue of the laws of the State of New York, with offices in the City of Rochester, State aforesaid, and said defendant is engaged in the sale and distribution of toilet articles, perfumes and the like in the said State, County and City of New York, in the Southern District of New York, in which district and elsewhere the infringing and wrongful acts complained of herein occurred and continue to occur.

1. That on or about the 15th day of June, 1920, a person representing herself to be Dorothy Dalton presented herself at the complainant's studio in the State, County and City of New York, for the purpose of having complainant pose, arrange and make artistic photographs of her.

2. That the complainant did on or about the 15 or 16th days of June 1920, arrange with great care, the said Dorothy Dalton in connection with certain back-ground, settings, lights, etc., at his
4 studio, so as to produce an artistic and pleasing appearance and effect to the eye, and of each posing and arrangement a photographic negative was made and the number of said negatives was approximately sixteen.

3. Complainant did develop, print and finish in a proper manner the said negatives and upon each copy of all of said photographs, there was with the knowledge and consent of the said Dorothy Dalton, clearly and distinctly placed the name "Lumiere" with the letter "C" within a circle, and none of the said negatives, photographs or copies thereof of the said Dorothy Dalton has been made by complainant without the said markings.

4. That the complainant, promptly after making the said photographs, deposited two copies of the best edition then published, of

one of the said photographs which is attached hereto and made a part hereof, and marked exhibit "A," with the Register of Copyrights, Washington, District of Columbia, and certificate of copyright registration has been duly issued therefor, and it is attached hereto and made a part hereof and marked exhibit "B."

5. Complainant is the sole owner, author and proprietor of said photographs and the copyright therein.

6. Defendant herein has wrongfully and with intent to infringe and discredit the artistic work and long years of experience of complainant, published copies of the said photograph of the said Dorothy Dalton, hereto attached and marked exhibit "A," with certain changes in detail and in color, and therefore has refused and failed to give due credit to the complainant as the true author and originator thereof, and the said defendant has caused and continues to cause large numbers of infringing copies to be made and distributed by printing, circulating and otherwise publishing the same in newspapers, periodicals and magazines, the exact number and method, and the names of all said publications are not within the knowledge of complainant. Among the numerous newspapers, magazines and publications which have wrongfully infringed complainant's copyright under the direction and instructions of defendant herein, are: The New York World, The Daily News and the New York Journal and many others, all of said infringing matter being printed as commercial advertising.

7. Defendant herein has caused the infringing copies aforesaid to be widely circulated and distributed in various ways throughout the United States, and thereby has deprived complainant of credit and benefit accruing to the author of a work of art and has damaged his said business and reputation as photographer and artist, the exact amount of such damage being difficult or incapable of proof.

8. Claimant is without remedy save in a Court of Equity, and therefore brings his Bill of Complaint.

Wherefore, Complainant prays that the defendant may be restrained by injunction perpetually, and each of its agents, servants and employees from publishing, printing, reprinting, copying, vending, offering for sale or otherwise distributing whatsoever copies of the photographs of said Dorothy Dalton, attached hereto and made a part hereof, marked exhibit "A," or any other imitation or colorable imitation of complainant's works as represented by said photograph, and that an order be made directing the defendant to answer the allegations herein and deliver up to a duly authorized officer of this Honorable Court, all of the said infringing copies to be impounded until further ordered, and that an accounting be rendered to complainant showing the exact number of said infringing copies so published, or caused to be published by the defendant, and that the defendant pay to complainant one dollar for every infringing copy made, sold, distributed or found in its possession or

its agents or employees, and all costs of this suit including
6 a reasonable attorneys' fee as provided by statute, and such other and further relief as the Honorable Court may in its wisdom deem just and equitable.

SAMUEL LUMIERE,
Complainant.

ALMY, VAN GORDON & EVANS,
46 Cedar Street,
Borough of Manhattan,
City of New York,
Attorneys for Complainant.

7 STATE OF NEW YORK,
County of New York, ss:

Samuel Lumiere, being duly sworn, deposes and says:

That he is the complainant herein, that he has read the foregoing bill in equity and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

SAMUEL LUMIERE.

Sworn to before me this 9th day of September, 1921.
PIERRE DE PEW,
N. P.

8 &9 Attached to the original complaint is the photograph of Dorothy Dalton as exhibit "A."

Attached to the original complaint is the Certificate of Copyright Registration of the photograph of Dorothy Dalton, as exhibit "B."

Filed Sep. 9 1921 U. S. District Court S. D. of N. Y.

10 [Endorsed:] United States District Court for the Southern District of New York. Samuel Lumiere, Complainant, against May Edna Wilder, (Inc.) Defendant. Bill in Equity. Almy, Van Gordon & Evans, 46 Cedar Street, Borough of Manhattan, City of New York, Attorneys for Complainant.

11 United States District Court, Southern District of New York.

In Eq.

22/149.

SAMUEL LUMIERE, Complainant,
vs.
MAE EDNA WILDER (INC.), Defendant.

Notice.

To Almy, Van Gordon & Evans, Attorneys for Complainant,
46 Cedar Street, Borough of Manhattan,
City of New York, New York.

GENTLEMEN:

Take notice that on Friday October 7, 1921 at ten o'clock A. M. or as soon thereafter as counsel can be heard, I shall present to the Judge of the United States District Court then calling the motion calendar, at the Post Office Building in the Borough of Manhattan, City of New York, on that day, the accompanying Motion to Quash service on the defendant in the above entitled cause appearing specially for the purpose.

FREDERICK F. CHURCH,
Appearing Specially for Defendant on This Motion.

711 Wilder Building, Rochester, New York.
Sept. 28, 1921.

Service of a copy of the annexed notice, motion and affidavit admitted this 29th day of September, 1921.

ALMY, VAN GORDON & EVANS,
Attorneys for Plaintiff.

12 United States District Court, Southern District of New York.

In Equity.

22/149.

SAMUEL LUMIERE, Complainant,

vs.

MAE EDNA WILDER (INC.), Defendant.

Motion to Quash Service.

Now comes the defendant herein, Mae Edna Wilder, Inc., named in the subpœna and bill of complaint and entering a special appearance by Frederick F. Church, its attorney for the purpose of this

motion and for no other purpose whatever, here shows the Court that it is a resident of and has its principal place of business in the City of Rochester, Monroe County, New York, and in the Western District of New York, and is not a resident of and has no place of business in the City of New York, nor within the Southern District of New York, and has no agent in the Southern District of New York, and as the State of New York is divided into several United States Judicial Districts and said defendant is not a resident of the District in which this suit was commenced, and it has not and does not waive its right under the provisions of Sec. 1034 U. S. Compiled Statutes 1916 (Sec. 52 of the U. S. Judicial Code) to be sued in the district of its residence, but insists upon such right; it therefore moves that the service of the subpœna ad respondendum on September 9, 1921, upon Thomas F. Adkin be quashed for the
13 reason that no sufficient service of said subpœna upon this defendant has been had.

FREDERICK F. CHURCH,
Appearing Specially for Defendant on This Motion.

711 Wilder Building, Rochester, New York.
Sept. 28, 1921.

14 United States District Court, Southern District of New York.

In Equity.

SAMUEL LUMIERE, Complainant,

vs.

MAE EDNA WILDER (INC.), Defendant.

Affidavit of Thomas F. Adkin.

COUNTY OF MONROE,
State of New York, ss:

Thomas F. Adkin being duly sworn, deposes and says as follows:

I am of lawful age, a resident of Rochester, New York, and am the President of Mae Edna Wilder, Inc., the defendant above named. The defendant corporation was formed under the Laws of the State of New York in the year 1909, and it has ever since said date been engaged in the manufacture and sale of cosmetics, toilet preparations, etc., all of its business having ben carried on in the city of Rochester, New York, where its principal place of business is and has been located, and it has no office or place of business in the city of New York, or in the Eastern District of New York, nor any employee or agent within said city or district authorized or empowered to carry on business in its name or on its behalf.

A subpœna and a copy of the Bill of Complaint in this case was delivered to me by a person representing himself as an officer of the Court at the door of my room in the Hotel Biltmore in the city of

New York while I was temporarily sojourning there about
15 & 16 four o'clock on the ninth day of September, 1921, and said person asked me if my name was Thomas F. Adkin, to which I replied that it was, and he then handed me the paper without further comment or statement.

THOMAS F. ADKIN.

Subscribed and sworn to before me this 28th day of September, 1921.

[SEAL.] RUSSELL B. GRIFFITH,
Notary Public.

Filed Sep. 29, 1921, U. S. District Court, S. D. of N. Y.

17 [Endorsed:] United States District Court, Southern District of New York. Samuel Lumiere, Complainant, vs. Mae Edna Wilder, (Inc.), Defendant. Motion to Quash Service. Frederick F. Church, 711 Wilder Building, Rochester, New York, Attorney for Defendant.

18 BBG:BK.

P. D. P.

District Court of the United States for the Southern District of New York.

In Equity.

#22–149.

SAMUEL LUMIERE, Complainant,

vs.

MAE EDNA WILDER (INC.), Defendant.

Opposing Affidavit.

SOUTHERN DISTRICT OF NEW YORK,
State of New York,
City and County of New York, ss:

Joseph M. Kelly being duly sworn deposes and says:

That he is a Deputy United States Marshal and is the person who actually served the subpœna in equity and the bill of complaint in this suit on the defendant corporation on the 9th day of September, 1921, in the City of New York, by exhibiting to Thomas F. Adkin, the president of said corporation the original subpœna and leaving with him a copy thereof and also leaving with him a copy of the bill of complaint.

That deponent went to a suite occupied by Mr. Adkin and Mr. Clark in the Hotel Biltmore and asked for Mr. Adkin and a person who answered to the rap on the door, turned and called to another in the room. When this other man stepped forward, deponent asked him, "Are you Mr. Thomas F. Adkin, president of the Mae Edna Wilder, Inc.?" To that he replied, "My name is Adkin but I am not president of the Mae Edna Wilder." Deponent thereupon said, "I serve you as such."

JOSEPH M. KELLY.

Sworn to before me this 6th day of October, 1921.

ARTHUR P. LAVERY,
Notary Public, New York Co., #392.

Filed Oct. 21, 1921. U. S. District Court, S. D. of N. Y.

19 At a Stated Term of the United States District Court for the Southern District of New York Held at the Post Office Building, City of New York, Borough of Manhattan, this 21st Day of October, 1921, Before Hon. Learned Hand, District Judge.

In Equity.

No. 22/149.

SAMUEL LUMIERE, Plaintiff,

vs.

MAE EDNA WILDER, Defendant.

On motion of Frederick F. Church appearing specially for defendant for the purpose, it is

Ordered, adjudged and decreed that the service of process in this case be and the same hereby is quashed.

LEARNED HAND,
U. S. D. J.

Filed Oct. 21, 1921. U. S. District Court, S. D. of N. Y.

20 BBG:BK.

In the District Court of the United States for the Southern District of New York.

SAMUEL LUMIERE, Complainant,

vs.

MAE EDNA WILDER (INC.), Defendant.

Notice of Settlement.

SIR:

Please take notice that a certificate, of which the within is a true copy, will be presented for settlement and entry herein to the Hon. Learned Hand, District Judge, at his chambers in the Woolworth Building, Borough of Manhattan, City of New York, on the 7th day of November, 1921, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard.

Dated: New York, November 4th, 1921.

Yours, etc.,

ALMY, VAN GORDON AND EVANS,
Solicitors for Complainant.

#46 Cedar Street, Borough of Manhattan, City of New York.

To Frederick T. Church, Esq., Solicitor for Defendant, #711 Wilder Building, Rochester, New York.

The time to make application and the term is hereby extended until such time as Judge Hand makes the certificate.

FREDERICK F. CHURCH,
By PHILIPP, SAWYER, RICE & KENNEDY,
For Defendant.

So ordered.
L. HAND,
U. S. D. J.
W. T.

21 BBG:BK.

In the District Court of the United States for the Southern District of New York.

In Equity.

22—149.

SAMUEL LUMIERE, Complainant,

vs.

MAE EDNA WILDER (INC.), Defendant.

Certificate.

The District Court for the Southern District of New York hereby certifies to the Supreme Court of the United States that on the 21st day of October, 1921, an order was duly made and entered in the above entitled action pursuant to the decision of said Court that the service of process in this case be quashed, the defendant having appeared specially and solely for the purpose of the motion to quash and the decision was made solely on the ground that the District Court had acquired no jurisdiction of the defendant corporation. The question of jurisdiction as shown by the record herein was one of service under Section 35 of the Copyright Act in a case where a bill brought in the Southern District of New York for an injunction and other relief for an infringement of complainant's copyrighted photograph, alleged that the defendant corporation was engaged in the sale and distribution of toilet articles, perfumes and the like in the Southern District of New York and had caused and continues to cause large numbers of infringing copies of complainant's photograph to be made and distributed by publishing them as commercial advertising in certain newspapers among them The New York World, The Daily News, The New York Journal, and where defendant was a corporation organized under the laws of the State of New York, having its principal place of business and being engaged in the manufacture and sale of cosmetics and toilet preparations in the City of Rochester which is in the Western District of New York, and having no employee or agent permanently located in the Southern
22 & 23 District of New York, authorized or empowered to carry on business in its name or in its behalf, and where a subpœna in equity and copy of the bill of complaint were served on the 9th day of September, 1921, by the United States Marshal for the Southern District of New York, upon Thomas F. Adkin, who was then and there the president of the defendant corporation, at the Hotel Biltmore in the City of New York, in the Southern District of New York, while he was temporarily sojourning there.

Dated: New York, November 4th, 1921.

LEARNED HAND,

W. T. *United States District Judge.*

Filed Nov. 14, 1921. U. S. District Court, S. D. of N. Y.

24 [Endorsed:] United States District Court, Southern District of New York. County Clerk. Index No. —, 192–. Samuel Lumiere, Complainant, vs. Mae Edna Wilder (Inc), Defendant. Office Copy. Certificate. Almy, Van Gordon & Evans, 46 Cedar Street, Borough of Manhattan, City of New York, Attorneys for Complainant. Filed November 14, 1921. (Copy.) Copy of within certificate and notice admitted this 4th November 1921. Frederic F. Church, by Phillip Sawyer, Rice & Kennedy, for Defendant.

25 P. D. P.

BBG:DTT.

United States District Court for the Southern District of New York.

In Equity.

22-149.

SAMUEL LUMIERE, Complainant,

against

MAE EDNA WILDER (INC.), Defendant.

Petition for Appeal.

Samuel Lumiere, the complainant in the above entitled cause, conceiving himself aggrieved by the order made and entered herein on the 21st day of October, 1921, by this Honorable Court, whereby it was ordered that the service of the process in this case be quashed, does hereby appeal under the provisions of Section 238 of the Judicial Code, from said order and from each and every part thereof to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal may be allowed and that a citation be issued directed to Mae Edna Wilder, Inc., the defendant in the above entitled cause, commanding it to appear before the Supreme Court of the United States, to do and receive what may appertain to justice to be done in the premises and that a transcript of the record proceedings and papers upon which said order was made and entered, may be duly authenticated by the Clerk of this Court and may be transmitted to the Supreme Court of the United States.

Dated: New York, November 25, 1921.

ALMY, VAN GORDON AND EVANS,
Solicitors for Complainant.

Office & Post Office Address, No. 46 Cedar Street, Borough of Manhattan, City of New York.

26 And now, to wit, on this 10th day of December, 1921, it is Ordered that the appeal be allowed as prayed for, on the ground that the question of jurisdiction of this Court alone is in issue.

Dated: New York, December 10, 1921.

AUGUSTUS N. HAND,
United States District Judge,
Southern Dist. of N. Y.

Filed Dec. 12, 1921. U. S. District Court, S. D. of N. Y.

27 P. D. P.

BBG:BK.

United States District Court for the Southern District of New York.

In Equity.

22-149.

SAMUEL LUMIERE, Complainant,

against

MAE EDNA WILDER (INC.), Defendant.

Complainant's Assignment of Errors.

The complainant in the above entitled case conceiving himself aggrieved by the order made and entered herein on the 21st day of October, 1921, by the Hon. Learned Hand, District Judge, whereby it was ordered that the service of the process in this case be quashed, now appeals therefrom and from each and every part thereof to the Supreme Court of the United States by his solicitors and files with his accompanying petition for an appeal the following Assignment of Errors upon which he will rely upon the appeal, to wit:

I. The District Court erred in holding that the service of process in this case be quashed.

II. The District Court erred in holding that the District Court of the United States for the Southern District of New York did not acquire jurisdiction of the defendant by the service by the United States Marshal for the Southern District of New York, on the 9th day of September, 1921, at the City of New York, in said district, upon the defendant, Mae Edna Wilder, Inc., of the subpœna in equity by exhibiting to Thomas J. Adkin, as president of defendant corporation, at the Biltmore Hotel in said City and District, the original and at the same time leaving with him a copy thereof, and also at the same time and place leaving with him a copy of the bill

of complaint herein, did not institute this suit which is a civil
28 suit brought under the Copyright Law of the United States, and which law provides in Section 35 thereof, among other things, that civil suits arising under this Act may be instituted in the distr-ct in which the defendant or his agent may be found.

III. The District Court erred in failing to hold that under Section 35 of the Copyright Law, this suit under the Copyright Law, was properly instituted by service of the subpœna and copy of the bill upon the defendant whose agent, to wit, its President, was found in the Southern District of New York.

Wherefore Complainant prays that said order may be reversed and that the District Court for the Southern District of New York, be directed to enter an order denying the motion of defendant to quash the service of the subpœna and the copy of the bill of complaint.

Dated: New York, November 25th, 1921.

ALMY, VAN GORDON AND EVANS,
Solicitors for Complainant.

No. 46 Cedar Street, City of New York.

Filed Dec. 12, 1921. U. S. District Court, S. D. of N. Y.

29 P. D. P.

BBG.:BK.

By the Honorable Augustus N. Hand, One of the United States District Judges for the Second Circuit, to Mae Edna Wilder (Inc.), Greetings:

You are hereby cited and admonished to be and appear before a Supreme Court of the United States to be holden at Washington, on the 9th day of January, 1922, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Samuel Lumiere is appellant, and Mae Edna Wilder, Inc., the appellee, to show cause, if any there be, why the errors in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, this 10th day of December, in the year of our Lord nineteen hundred and twenty-one.

AUGUSTUS N. HAND,
U. S. District Judge, S. D. N. Y.

W. T.

Filed Dec. 14, 1921. U. S. District Court, S. D. of N. Y.

30 BBG.:BK.

United States District Court for the Southern District of New York.

In Equity.

22-149.

SAMUEL LUMIERE, Complainant,

against

MAE EDNA WILDER (INC.), Defendant.

It is hereby stipulated and agreed that the provisions of the United States Supreme Court Equity Rules No-. 75, 76 and 77 be and they are hereby waived.

It is further stipulated and agreed that the record on appeal herein shall consist of the following papers:

1. Subpœna in equity.

2. United States Marshal's certificate of service of subpœna and copy of bill.

3. Bill in equity.

4. Special appearance by Frederick F. Church, Esq., for defendant and notice of motion to quash.

5. Defendant's motion to quash service.

6. Affidavit of Thomas F. Adkin in support of the motion to quash.

7. Affidavit of Joseph M. Kelly in opposition.

8. Order of Hon. Learned Hand, District Judge, quashing service which is the order appealed from.

9. Certificate by the Hon. Learned Hand, District Judge.

10. Petition on appeal and allowance.

11. Assignment of errors.

12. Citation.

13. This stipulation.

14. Stipulation approving contents of record.

31 15. Clerk's certificate.

And it is further stipulated and agreed that no written opinion was handed down by the Hon. Learned Hand upon the decision of the motion to quash.

It is further stipulated that when the record on appeal is so prepared, the same will constitute the record on appeal for all the parties herein and upon the presentation of the record so prepared, the Clerk shall certify the same without further order of the Court.

Dated: New York, December 12th, 1921.

ALMY, VAN GORDON & EVANS,
Solicitors for Complainant.
FREDERICH F. CHURCH,
Solicitor for Defendant, Appearing Specially.

It is so ordered.
L. HAND,
U. S. District Judge.
W. T.

December 22nd, 1921.

Filed Dec. 22, 1921. U. S. District Court, S. D. of N. Y.

32 BBG.:BK.

United States District Court for the Southern District of New York.

In Equity.

22-149.

SAMUEL LUMIERE, Complainant,

against

MAE EDNA WILDER (INC.), Defendant.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter, as agreed on by the parties.

Dated: New York, December 12th, 1921.

ALMY, VAN GORDON & EVANS,
Solicitors for Complainant.
FREDERICH F. CHURCH,
Solicitor for Defendant, Appearing Specially.

33 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Eq. 22-149.

SAMUEL LUMIERE, Complainant,

vs.

MAE EDNA WILDER, INC., Defendant.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 22nd day of December in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the said United States the one hundred and forty-sixth.

[Seal of District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

Endorsed on cover: Filed No. 28,624. S. New York D. C. U. S. Term No. 242. Samuel Lumiere, appellant, vs. Mae Edna Wilder, Inc. Filed January 4th, 1921. File No. 28,634.

FILED
JAN 19 1923
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 242.

SAMUEL LUMIERE, *Appellant,*

vs.

MAE EDNA WILDER, INC., *Appellee.*

BRIEF FOR APPELLEE.

FREDERICK F. CHURCH,
Counsel for Appellee.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 242.

SAMUEL LUMIERE, *Appellant*,

vs.

MAE EDNA WILDER, INC., *Appellee*.

BRIEF FOR APPELLEE.

This is an appeal from a decision and order of the District Court for the Southern District of New York quashing service of process and dismissing the bill for want of jurisdiction. The appeal is taken under Section 238 of the Judicial Code on the certificate of Judge Learned Hand (p. 10 Trans.).

The facts appearing from the Transcript of the Record are as follows:

This is a suit in equity for alleged infringement of copyright.

Plaintiff is a resident of New York City, and defendant a corporation under the laws of New York

with its principal place of business at Rochester, New York, and is a resident of the City of Rochester in the Western District of New York (Fol. 3, p. 2 Trns.).

Defendant has no office or place of business, and no agent or representative in the Southern District of New York, and no person residing there has been designated upon whom service can be made. (Fol. 14, p. 6 Trans.)

The subpoena was served upon Thomas F. Adkin, President of the defendant corporation, but who is a resident of Rochester, N. Y. (Fol. 14, p. 6 Trans.) at the Hotel Biltmore in the City of New York in the Borough of Manhattan, by delivering a copy of the same to him while he was temporarily sojourning in that city. (Fols. 16-7, p. 7 Trans.)

Defendant's appearance on the motion to quash service was special and for that purpose only (Fol. 11, p. 5 Trans.).

The State of New York is divided into four districts—Eastern, Southern, Northern and Western, and New York City is in the Southern, and Rochester, the residence of the defendant, in the Western District (Sec. 96 U. S. Jud. Code).

The U. S. Judicial Code, approved March 3, 1911, provides as follows:

> *Sec. 51.* Except as provided in the five succeeding sections, no person shall be arrested * * * and except as provided in the six succeeding sections no *civil suit shall be brought in any district court against any person by any original process in any other district than that whereof he is an inhabitant*, but where the jurisdiction is founded *only* on the fact that the action is between citizens of different States, suit shall be brought only in

the district of the residence of either plaintiff or defendant.

Sec. 52. When a State contains more than one district, every suit *not of a local nature*, in the district court thereof, *against a single defendant*, inhabitant of such State, *must be brought in the district where he resides;* but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ issued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State.

The United States Courts have exclusive jurisdiction of Copyright cases, and this suit is therefore not of a "local nature" within the meaning of Section 52 of the Code *supra.*

Casey vs. Adams, 102 U. S. 66;
Wagner & Wilson, 225 Fed. 912.

The suit *not* having been brought against co-defendants, the prohibition of the section is to be given its full meaning.

Camp vs. Gress, 250 U. S. 308.

The mere fact that defendant's president was temporarily within the district when served does not confer jurisdiction upon this Court, nor make good the service of the subpoena.

Goldey vs. The Morning News, 156 U. S. 518;
Int. Harvester Co. vs. Kentucky, 234 U. S. 579;
Phila. & R. Ry. Co. vs. McKibben, 243 U. S. 264-5;
Peoples Tobacco Co. vs. Am. Tobacco, 246 U. S. 79;
Camp vs. Gress, 250 U. S. 308;
Rosenberg Bros. vs. Curtis Brown Co. (decided by Sup. Ct. Jan. 4, 1923, and not reported);
Goodhope Co. vs. Railway B. Fencing Co., 22 Fed. 635;
Wilkins vs. Queen City S. B. & T. Co., 154 Fed. 173;
Hoyt vs. Ogden Portland Cement Co., 158 Fed. 890;
Cody Motors Co. vs. Warren Motor Car Co., 196 Fed. 254;
Craig vs. Welch Motor Car Co., 165 Fed. 554.

Appellant evidently relies upon the fact that Judicial Code Sec. 256 vests in the United States Courts exclusive jurisdiction in copyright cases and upon the Copyright Act, March 4, 1909, C. 320, Sec. 35, which provides:

> *Sec. 35.* That civil actions, suits or proceedings arising under this Act may be instituted in the district of which the defendant or his agent is an inhabitant or in which he may be found.

As defendant appellee is a corporation and is not an inhabitant of the district in which the suit is brought, the only remaining question is whether it is "found" in the district within the meaning of this statute.

This Court has, in no uncertain terms decided, where a corporation can be "found" within the meaning of the Statutes.

In *Peoples Tobacco Co. vs. American Tobacco Co.*, 246 U. S., pp. 79-84, in referring to suits under the Sherman Act, this Court said:

> "Section 7 of the Sherman Act provides that suits of the character of the one under consideration may be brought in the district in which the defendant "resides or is found." When applied to a corporation this requirement is the equivalent of saying that it must be present in the district by its officers and agents *carrying on the business of the corporation.* In this way only can a corporation be said to be found within the district. In that manner it may manifest its submission to local jurisdiction and become amenable to local process."

The same question was decided in the same way in the following cases

International Harvester Co. vs. Kentucky, 234 U. S. 579;

Phila. & Reading Ry. Co. vs. McKibbin, 243 U. S. 264;

Chipman vs. Thos. B. Jeffery Co., 251 U. S. 373-9;

Rosenberg Bros. vs. Curtis Brown Co. (Jan. 4, 1923).

Notwithstanding the fact that in some of the cases above cited the question decided was with regard to the defendants being found within the *State* and did not specifically refer to the *district* within the State where there were two or more districts, the decision in *Peoples Tobacco vs. American Tobacco Co., supra,* is controlling and directly in point, as in that case the language of the Sherman Act requiring that suit may

be brought "in the district" is the same as that in both the Judicial Code and in the Copyright law above referred to.

Appellant's contention that the language of Section 35 of the Copyright Act means that a suit may be brought, not only in any district of which the defendant or his agent is an inhabitant, but in any district where either the defendant or his agent may be found, in the sense that either of them is "found" when served with process, is absurd and is contrary to reason and to the many authoritative decisions construing similar language.

The word "he" in the last clause of the Statute can only mean the defendant, and indicates the place where "he," if an individual, or "it," if a corporation, may be found. If it had been the intention of Congress to make such a radical change in the law and to permit a corporation, for instance, to be sued under this Act whenever one of its officers might be temporarily or casually sojourning, and contrary to a long line of precedents respecting the meaning of the word "found" as applied to corporations, the clause would have read "they or either of them may be found."

The statement in appellant's brief to the effect that it was the intention of Congress to change the status provided by Section 52 of the Judicial Code by the provision of the Copyright law, is completely answered by a consideration of the dates of the passage of the laws themselves, for the Copyright Law was passed in March, 1909, and the Judicial Code passed March 3rd, 1911 (Ch. 231, 36 St. L. 1087).

The judgment of the Court below quashing the service and dismissing the bill should be affirmed.

FREDERICK F. CHURCH,
Counsel for Appellee.

Office Supreme Court, U.
FILED
JAN 17 1923
WM. R. STANSBUR
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1921.

SAMUEL LUMIERE,
Appellant,
against
MAY EDNA WILDER, INC.,
Appellee.
} No. 242.

Statement.

This appeal is taken under Section 238 of the Judicial Code (Barnes Federal Code, Section 1003) because the jurisdiction of the United States District Court for the Southern District of New York is the only question at issue.

Argument.

The question arises in a copyright case, and is in substance, did the District Court for the Southern District of New York get jurisdiction of a corporation residing in the jurisdiction of the District Court for the Western District of New York by the service of process upon an officer of the Company within the jurisdiction of the Southern District of New York.

The question must be determined by a construction of Section 35 of the Copyright Act. So far as we are informed this Court has never decided this question under the statute which is controlling in this case.

Section 35 of the copyright Act provides as follows:

> "Civil actions, suits or proceedings arising under this Act may be instituted in the District of which the defendant or his agent is an inhabitant, or in which he may be found."

There can be no question but that the President of the Company was the agent of the Company, and that he was served with process in the City of New York, within the Southern District of New York. If, then, jurisdiction can be acquired by service on defendant's agent within the district, the Court has jurisdiction in this case.

Under the plain meaning of the words of this law if the *president* of this Corporation was an inhabitant of the City of New York, within the Southern District of New York, the corporation could be sued in the Southern District of New York, notwithstanding the fact that the *defendant* was an inhabitant of the Western District of New York. The statute specifically says so. If it were otherwise the words of the section "or his agent" would be entirely superfluous.

We contend that the plain intent of Congress was, not only to give jurisdiction to the District Court in which the defendant or his agent was a resident, but also to any District Court in which the defendant or his agent may be found. The punctuation plainly shows that two contingencies were considered. One, the residence of the defendant or his agent, and two, the place where the

defendant or his agent was found and served with process.

We contend that the word "he " in the last clause refers to the "defendant or his agent" and that it means that civil actions under the Copyright Law may be instituted in the District in which the defendant's agent is found in the sense that he is served with process.

Any other interpretation with respect to a corporation would be impossible, since one can find or serve a corporation only in the person of its agent.

We are not unmindful of the many decisions under the Anti-Trust, the Patent and similar statutes, which have determined that a Corporation is not "found" in a district when one of its officers is temporarily in the district, even though he be conducting some incidental business of the Company. The distinction between these statutes in which these decisions have been made and the statute at bar is, that, at bar, by the very language of the statute it is provided that one can serve either the defendant or his agent, where either resides or is found, whereas this language is not used in any of the other statutes under consideration.

The manifest purpose of this enactment was to increase the protection that the copyright act was designed to provide for authors, and make it as convenient as possible for them to promptly and expeditiously enforce their rights.

If it was not the intention of Congress to change the status provided by Section 52 of the Judicial Code, this section of the Copyright Act would be unnecessary.

Cases decided under Section 52 of the Judicial Act can have no application for jurisdiction under

that section is limited to the district where the defendant "resides".

Cases under the Sherman Act are not in point (Barnes Federal Code Sections 79-61) for the language of that section is "the district in which the *defendant* resides or is found or *has an agent*". Having an agent in a district plainly means something definite and permanent and is distinctly in contrast with the situation where service may be made in the district where the "defendant *or his agent* resides or in which he may be found."

Cases under the Patent Law (Judicial Code, Section 48, Barnes Federal Code Section 810) are not in point. The language of that section is "the District Courts of the United States shall have jurisdiction * * * in the district of which the defendant is an inhabitant or in any district in which the defendant "shall have committed acts of infringement, and have a regular and established place of business." The distinction is manifest.

In conclusion we contend that the words of this Act shall be given their plain and usual meaning. That therefore when the service was made upon the President of the Corporation within the jurisdiction of the United States District Court for the Southern District of New York, the suit was instituted within the district in which the defendant's agent was found; hence the Court had jurisdiction, and the judgment of the District Court should be reversed and the cause remanded for further proceedings.

Respectfully submitted,

WILLIAMS S. EVANS,
Counsel for the Plaintiff in error,
46 Cedar Street,
New York City.

Office Supreme Court, U. S.
FILED
JAN 16 1923
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

No. 242

SAMUEL LUMIERE, APPELLANT,

vs.

MAE EDNA WILDER, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLEES MOTION TO DISMISS UNDER RULE 21.

FREDERICK F. CHURCH,
Counsel for Appellee

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1922

SAMUEL LUMIERE,
Appellant,

vs.

MAE EDNA WILDER, INC.
Appellee.

NO. 242.

Messrs. Almy, VanGorden & Evans,
Attorneys for Appellant,
46 Cedar Street,
Borough of Manhattan,
New York City.

TAKE NOTICE that at the call of the above entitled case for argument on Thursday, the 18th of January, 1923, or at such other time as the case may be reached and called, I will present for the consideration of the Court the accompanying motion to dismiss the case under the provisions of Section 5 of Rule 21.

(Signed) FREDERICK F. CHURCH,
Attorney for Appellee.

Service of a copy of the annexed motion and affidavit, admitted this 13th day of January, 1923.

ALMY, VAN GORDON & EVANS,
Attorney for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1922

SAMUEL LUMIERE,
Appellant.

vs.

MAE EDNA WILDER,
Appellee.

NO. 242.

MOTION TO DISMISS UNDER RULE 21.

NOW COMES the appellee, Mae Edna Wilder, Inc. by Frederick F. Church, its attorney, and moves that the appeal in the above entitled case be dismissed under the provisions of Section 5 of Rule 21, no brief on the part of Appellant having been filed or served upon appellee's counsel, as shown by the accompanying affidavit.

(Signed) FREDERICK F. CHURCH,
Attorney for Appellee.

Rochester, New York,
January 12, 1923.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1922

SAMUEL LUMIERE,
Appellant,

vs.

MAE EDNA WILDER,
Appellee.

NO. 242.

AFFIDAVIT OF FREDERICK F. CHURCH.

County of Monroe, }
State of New York, } ss.:

Frederick F. Church, being duly sworn, deposes and says that he is a resident of Rochester, New York, a member of the Bar of the Supreme Court, and appears as attorney for the Appellee, Mae Edna Wilder, Inc. in the above entitled cause; that he is informed by the Clerk of the Court that the above entitled cause will in all probability be reached for hearing on or about the 18th day of January, 1923; that he has not been served with a copy of a brief on the part of appellant, and has not stipulated or agreed to receive shorter notice than is required by the Rule.

(Signed) FREDERICK F. CHURCH.

Subscribed and sworn to before me, a Notary Public, this 12th day of January, 1923.

(Seal)

ESTHER M. ENNIS,
Notary Public.

LUMIERE *v.* MAE EDNA WILDER, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 242. Argued January 18, 1923.—Decided February 19, 1923.

Under the provision of the Copyright Act that suits "may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found," jurisdiction cannot be acquired over a corporation in a district where it has no office and does no business, by serving process on its president while there temporarily and not on business of the corporation. P. 177.

Affirmed.

APPEAL from an order of the District Court quashing service of a subpœna *ad respondendum*.

Mr. Williams S. Evans for appellant.

We contend that the plain intent of Congress was, not only to give jurisdiction to the court of the district where the defendant or his agent was a resident, but also to that of any district in which the defendant or his agent may be found. The punctuation plainly shows that two contingencies were considered. One, the residence of the defendant or his agent, and two, the place where the defendant or his agent was found and served with process.

We contend that the word "he" in the last clause refers to the "defendant or his agent" and that it means that civil actions under the copyright law may be instituted in the district in which the defendant's agent is found in the sense that he is served with process.

Any other interpretation with respect to a corporation would be impossible, since one can find or serve a corporation only in the person of its agent.

We are not unmindful of the many decisions under the anti-trust, the patent and similar statutes, which

have determined that a corporation is not "found" in a district when one of its officers is temporarily in the district, even though he be conducting some incidental business of the company. The distinction between the statutes on which these decisions have been made and the statute at bar is, that, at bar, by the very language of the statute it is provided that one can serve either the defendant or his agent, where either resides or is found, whereas this language is not used in any of the other statutes under consideration.

The manifest purpose of this enactment was to increase the protection that the Copyright Act was designed to provide for authors,—make it as convenient as possible for them to enforce their rights.

If it was not the intention to change the status provided by § 52, Jud. Code, this section of the Copyright Act would be unnecessary.

Cases decided under § 52, Jud. Code, can have no application, for jurisdiction under that section is limited to the district where the defendant "resides."

Cases under the Sherman Act are not in point for the language there is, "the district in which the defendant resides or is found or has an agent." Having an agent in a district plainly means something definite and permanent and is distinctly in contrast with the situation where service may be made in the district where the "defendant or his agent resides or in which he may be found."

Cases under the patent law, Jud. Code, § 48, are not in point. The language of that section is "the district courts of the United States shall have jurisdiction . . . in the district of which the defendant is an inhabitant, or in any district in which the defendant . . . shall have committed acts of infringement and have a regular and established place of business." The distinction is manifest.

The words of this act should be given their plain and usual meaning.

Mr. Frederick F. Church for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The venue of suits for infringement of copyright is not determined by the general provision governing suits in the federal district courts. Judicial Code, § 51. The Copyright Act provides that suits "may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found." Act of March 4, 1909, c. 320, § 35, 35 Stat. 1075, 1084. Whether under this section a valid service was made upon defendant is the only question for decision.

New York is divided into four federal judicial districts. Judicial Code, § 97. Lumiere, a citizen and resident of New York City, in the Southern District, brought, in the federal court for that district, this suit to enjoin the infringement of a copyright by publications in that city. The defendant, Mae Edna Wilder, Inc., is a New York corporation with its place of business in Rochester, in the Western District. It was not an inhabitant of the Southern District. It had no place of business there. It had no agent or employee there authorized to carry on business on its behalf. It transacted no business there. The only service of process made was by delivering to Mr. Adkin, who was its president, a copy of the subpoena while he was temporarily in New York City. He was not an inhabitant of the Southern District; and it was not shown that he was there on business of the company. The defendant, appearing especially for the purpose of objecting to the jurisdiction of the court, moved to quash the service on the ground that it was not amenable to process. The motion was granted; and the case is here on appeal

under § 238 of the Judicial Code, the question of jurisdiction having been duly certified.

That jurisdiction over a corporation cannot be acquired in a district in which it has no place of business and is not found, merely by serving process upon an executive officer temporarily therein, even if he is there on business of the company, has been settled. *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264; *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516; *Bank of America* v. *Whitney Central National Bank, ante*, 171. The contention here is that jurisdiction was obtained over the defendant because its president is an agent within the meaning of the statute and was personally found in New York City. If such facts are sufficient to give jurisdiction, a suit upon a copyright may be brought in any district of the United States in which one who is an officer or an agent of a defendant is served with process; although neither plaintiff nor defendant has his residence or a place of business there, and although the copyright was not infringed there. It is not to be lightly assumed that Congress intended such a thing. Compare *In re Keasbey & Mattison Co.*, 160 U. S. 221; *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501; *Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357.

Ordinarily a civil suit to enforce a personal liability under a federal statute can be brought only in the district of which the defendant is an inhabitant. Judicial Code, § 51. In a few classes of cases, a carefully limited right to sue elsewhere has been given. In patent cases it is the district of which the defendant is an inhabitant or in which acts of infringement have been committed and the defendant has a regular and established place of business. Judicial Code, § 48; *W. S. Tyler Co.* v. *Ludlow-Saylor Wire Co.*, 236 U. S. 723. In cases under the anti-trust laws, it is where the defendant "resides or is found or has an agent;" (Act of October 15, 1914, c. 323, § 4, 38 Stat.

730, 731); and in the case of corporations, the "district whereof it is an inhabitant" or "any district wherein it may be found or transacts business." § 12, p. 736. It is not reasonable to conclude that Congress intended in copyright cases to give a right far greater than these. Agent is a word used in the law in many senses. What it means in a statute is to be determined from the context and the subject-matter. The president of a business corporation is, commonly, authorized to represent it for many purposes; and it may often be said properly that he is acting as its agent. But induction into office does not impress upon a person the status of agent of the corporation, so that he must be deemed its agent in every jurisdiction which he happens to enter, although the corporation transacts no business there and he is not there in any way representing it. The service of process made upon Mr. Adkin was, clearly, not service upon an agent of the corporation within the meaning of the Copyright Act.

As there is in this case only one defendant, the provision concerning suits in States which contain more than one federal judicial district can have no application. See Judicial Code, § 52; *Camp* v. *Gress*, 250 U. S. 308, 314. Whether, under the Copyright Act, service upon an agent would be effective as upon one "found," if it appeared that the agent when served was transacting some business for defendant within the jurisdiction, but was there only temporarily and had his residence and place of business elsewhere, is a question which we need not decide in this case.

Affirmed.